82-190

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES P. McDERMOTT, pro se, as

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James P. McDermott
1774 Eastburn Avenue
Bronx, New York 10457
Petitioner Pro Se

QUESTIONS PRESENTED

1. Whether the Court of Appeals has overlooked or misapprehended questions of law, or fact, including plain error apparent on the record, even in a civil case, the substantive evidence rule and the clearly erroneous rule to cause a miscarriage of justice.

2.a. Whether ministerial duty breached by District Court was sanctioned by Court of Appeals' (2nd Circuit) Orders (2) entered about March 13, 1981 denying petitioner's motions requesting certification of Constitutional questions and correction of the record of the District Court.

2.b. Whether the District Court has ministerial duty to permit all of plaintiff-appellant's papers to be entered in the docket chronologically by Rule 79., Fed. R. Civ. P. the same as per treatment

given to defendants.

3. Whether where Court's manner was prompted by wrong motives there is not only abuse of discretion but there has been no exercise of discretion on the merits.

4. Whether complaint filed under Sections 2201 et seq. of 28 U.S.C. is not simply dismissed where constitutional question exists and provides jurisdiction to the courts for declaration of rights further relief and creation of a remedy.

5. Whether a single judge of the District Court usurped the power of a 3-judge court and further abused power by usurping right to have jury hear issues in controversy. (Points I-IV)

6. Whether the absence of an evidentiary hearing, because factual dispute existed, was a denial of petitioner's

right to full and fair hearing under the equal protection component of the Fifth Amendment's Due Process Clause of the Constitution of the United States. (Points I-V).

7.a. Whether under the Emolument Clause claim (Article 1, section 9, the U.S. Constitution) and U.S. Statutes [22 U.S.C., Sections 804, 2621 and 2625 and 18 U.S.C., section 209(a)], emoluments such as the Nobel Prize of 1977 to employees of the Veterans Administration are constitutionally prohibited and subject to the jurisdiction of the Supreme Court in this case.

7.b. Whether human experimentation conducted in Veteran Administration hospitals is in violation of domestic human rights as guaranteed under the Ninth Amendment of the U.S. Constitution.

7.c. Whether the Consul General et al. of Sweden are subject to the constitutional prohibitions on emoluments such as the Nobel Prize.

LIST OF THE PARTIES

The petitioners herein are: JAMES P. MC DERMOTT, on behalf of himself and other similarly situated,

The respondants herein are: ATTORNEY GENERAL OF THE UNITED STATES; DIRECTOR OF CENTRAL INTELLIGENCE AGENCY; DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; SECRETARY OF THE ARMY; SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; DIRECTOR OF THE NATIONAL BUREAU OF STANDARDS; DIRECTOR OF THE NATIONAL SECURITY AGENCY; SECRETARY OF STATE; SECRETARY OF THE TREASURY; SOLICITOR GENERAL; UNITED STATES POSTAL SERVICE; PRESIDENT OF THE UNITED STATES; THE UNITED STATES OF AMERICA; ADMINISTRATOR OF THE VETERANS ADMINISTRATION; THE CIVIL SERVICE COMMISSIONERS; SECRETARY OF THE DEPARTMENT OF ENERGY; COMMISSIONER OF INTERNAL REVENUE SERVICE; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE UNITED STATES; ROSALYN S. YALOW; CYRUS R. VANCE; DIRECTOR OF THE BRONX V.A. MEDICAL CENTER; EUGENE STRAUS; FRANK LOVELOCK; DANIEL STONE; HUGH BARBER; WILLIE MILLER; J.M. TORRES; "JOAN DOE" AS EXECUTRIX OF THE SOLOMON A. BERSON ESTATE; JOSEPH TEDESCO; STUMP: ALPERT; OPPENHEIMER; A.M. KLEINMAN; JULIUS WOLF; OVITZ; HOWARD FRIEDMAN; LAWRENCE FEINMAN; HENRY D. JANOWITZ; MARK A. KORSTEN; CHARLES S. LIEBER; HERBERT G. ROSE; MARTIN AMES; MORTON KARMIOL; UNKNOWN PAST AND PRESENT V.A. PHYSICIANS AND V.A. AGENTS; JONATHAN BINGHAM; D.P. MOYNIHAN; J.

JAVITS; HERMAN BADILLO; UNKNOWN PAST AND PRESENT CONGRESSMEN OF THE UNITED STATES; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE U.S. POSTAL SERVICE; DISABLED AMERICAN VETERANS (D.A.V.); JOHN REGAN; WILFRED PUENTES ESTATE EXECUTRIX; JAMES M. WATERS; CHARLES MC LEOD; UNKNOWN PAST AND PRESENT D.A.V. OFFICERS; D.A.V. NATIONAL ADJUSTANT AS CHIEF EXECUTIVE OF D.A.V.; DONALD T. FARLEY; ARTHUR P. WAGNER; UNKNOWN PAST AND PRESENT CONCULAR OFFICIALS OF THE UNITED STATES; CITY OF NEW YORK; MAYOR OF NEW YORK; EDWARD KOCH; COMMISSIONER POLICE DEPARTMENT OF THE CITY OF NEW YORK; UNKNOWN PAST AND PRESENT OFFICERS OF THE POLICE DEPARTMENT; ENVIRONMENTAL PROTECTION ADMINISTRATION ADMINISTRATOR; DEPARTMENT OF SANITATION COMMISSIONER: AARON YALOW; UNKNOWN OFFICERS AND AGENTS OF EPA AND THE DEPARTMENT OF SANITATION; COMMISSIONER DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; DIRECTOR OFFICE OF RENT CONTROL; DANIEL W. JOY; ROBERT ZITNER; ELI SHUB; COMMISSIONER DEPARTMENT OF INVESTIGATIONS; MONICA BLUM; NICHOLAS SCOPPETTA; COMMISSIONER DIVISION OF VETERANS AFFAIRS; ROBERT J. DE SANCTIS; WILSON; DISTRICT ATTORNEY OF BRONX COUNTY; SANFORD GARELICK; ANTHONY BOUZA; BURTON ROBERTS; "JOHN DOES" OF THE CITY OF NEW YORK; BOARD OF HIGHER EDUCATION; CHANCELLOR OF CITY UNIVERSITY OF NEW YORK; THOMAS C. CHALMERS; PRESIDENT MOUNT SINAI SCHOOL OF MEDICINE; BERNARD J. BULKIN; CHAIRMAN CHEMISTRY DEPARTMENT; DAVID L. BEVERIDGE; JOSEPH DANNENBERG; CHARLES E. HECHT; KLAUS GROHMANN; LOUIS MASSA;

JACK HERZ; HENRY D. JANOWITZ; S. COSTELLO; CHANCELLOR AND UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE BOARD OF REGENTS AND THE UNIVERSITY OF THE STATE OF NEW YORK; THE GOVERNOR; THE SECRETARY OF STATE; ROBERT ABRAMS; THE ATTORNEY GENERAL; COMMISSIONER OF EDUCATION; PRESIDENT OF THE UNIVERSITY OF THE STATE OF NEW YORK; THE KING OF SWEDEN; CONSUL GENERAL OF SWEDEN; KAROLINSKA INSTITUTE; NOBEL PRIZE TRUSTEES; UNKNOWN PAST AND PRESENT AGENTS OF THE NOBEL PRIZE COMMITTEE; CITIBANK, NA; PRESIDENT OF CITIBANK, NA AND BOARD OF TRUSTEES; CITICORP; UNKNOWN PAST AND PRESENT AGENTS OF CITIBANK, NA; CONSOLIDATED EDISON CO.,' N.Y.; CHARLES L. LUCE; PRESIDENT AND CHAIRMAN; THE BOARD OF TRUSTEES; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF CON EDISON; ANN-GUR REALTY CORPORATION; MARVIN YASGUR; VICTOR "DOE" AND UNKNOWN PAST AND PRESENT AGENTS OF ANNGUR REALTY; BRONX-LEBANON HOSPITAL CENTER; PRESIDENT FRED SILVERMAN; SCHAFFLER SECURITY V.P.; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF BRONX-LEBANON HOSPITAL CENTER; MONTEFIORE HOSPITAL AND MEDICAL CENTER; PRESIDENT MARTIN CHERAKASKY; MARY ANNE MULLEN AND UNKOWN PAST AND PRESENT OFFICERS AND AGENTS; ROCKEFELLER UNIVERSITY HOSPITAL; CHIEF PHYSICIAN; ATTALLAH KAPAS; NUALLAH AND UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF ROCKEFELLER UNIVERSITY HOSPITAL FOR CANCER AND ALLIED DISEASES; PRESIDENT GLENN A WASSELMANN; MILDRED SKLENA; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF MEMORIAL HOSPITAL FOR CANCER

AND ALLIED DISEASES; NEW YORK UNIVERSITY; BOARD OF TRUSTEES; PRESIDENT OF NEW YORK UNIVERSITY; LYLE BORST; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF NEW YORK UNIVERSITY; ALBERT AND MARY LASKER FOUNDATION; PRESIDENT AND THE BOARD OF TRUSTEES OF LASKER FOUNDATION; MARY LASKER; UNKNOWN PAST AND PRESENT OFFICERS AND AGENTS OF THE LASKER FOUNDATION; UNITED STATES COURT OF APPEALS (2ND CIRCUIT); J. EDWARD LUMBARD; JON O. NEWMAN; ROBERT C. ZAMPANO; AMALYA L. KEARSE as judges thereof; UNITED STATES DISTRICT COURT (S.D.N.Y.); LLOYD F. MACMAHON as chief judge thereof; RAYMOND F. BURGHARDT as chief clerk thereof; ANDREW V. SCHALLY,

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Picket v. Travelers Indemnity Co., (1960) 283 F. 2d. 835.

Swift v. United States 316 U.S. 216, 86 L.Ed. 1391, 62 S. Ct. 948.

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Journal of Clinical Investigation, 1956, 35, 170.

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No. _____

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES P. McDERMOTT, pro se, as

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI

The petitioner, James P. McDermott, pro se, prays respectfully that the Court, in its discretion, grant a writ on the judgment entered on November 20, 1981.

[1]"et al." refers to the defendants originally captioned also in the Complaint filed in District Court, except herein includes proposed changes requested by motions; e.g., see "Amendment to Complaint" (filed 11-28-80 ret.

The judgment invoking certification was entered by the United States Court of Appeals on November 20, 1981. A petition for rehearing filed by the Petitioner herein on December 3, 1981, was denied by the Court of Appeals on January 28, 1982, and a notice of appeal was filed on February 24, 1982. Copies of said judgment, order and notice are appended hereto.

In addition, the two orders by the Court of Appeals during appellant's motions for Certification of Constitutional Questions and for Correction of the Record of the District Court, respectively, entered on March 2, 1981, are appended to invoke the writ, too.

As required by Rules 28.4(b) and 28.4(c) of the Rules of this Court, 28 U.S.C. secs. 2403(a) and 2403(b) may

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12-9-80) and et cetera. Appended herein as Appendix A is a transcription of said caption.

be applicable but no court of the United States, as defined by 28 U.S.C. sec. 451, has certified what was drawn in question.

JURISDICTION

This case is in the nature of a domestic human rights case and jurisdiction of this Court may be invoked under any of the following sections of Title 28, U.S. Code: 1254(1) and 1254(3) respectively. This application for certification of questions of law which have not been but should be settled by this Court also provides jurisdiction. Rule 17 of the Rules of this Court indicates that application for certification of the inferior Court's departure from accepted and usual course of judicial proceedings as to call for an exercise of the Supreme

Court's supervision provides jurisdiction.

PRELIMINARY STATEMENT

Seeking declaratory, and injunctive relief as well as money damages for violations of his civil rights plaintiff-appellant, acting pro se initiated this action in the U.S. District Court, Southern District N.Y. on April 15, 1980. The District Court (MacMahon, Ch. J.), by memorandum and order (entered on December 5, 1980) granted the government's motions and dismissed the complaint as frivolous with respect to the defendants and further certified that any appeal from said order in forma pauperis would not be taken in good faith. On December 31, 1980, plaintiff appealed the memorandum

and order as merely an interlocutory decision appealable as of right. Judgment was entered 10 days after the opinion was entered.

On December 22, 1980 plaintiff's motion under 28 U.S.C., Sec 1292 (b) and Rule 5(a) Fed. R. App. P. alleged that the District Court usurped the power reserved to a jury and therefore its decisions were interlocutory. Earlier, December 9, 1980, the plaintiff filed papers on "personal knowledge" and also filed motion for rehearing based on new evidence. In the judgment some of these motions were dismissed as moot, as was the earlier motion of November 28, 1980 requesting leave to serve an Amendment to Complaint.

As a further abuse of authority during pre-trial motions, all of the defendants were stayed by court order from responding to plaintiff-appellant's

requests for evidentiary admissions or requests for discovery of defendants' addresses.

Furthermore, the defendants pleaded no contradictory factual version of any issue raised by the plaintiff but they merely asserted the complaint was insufficient on its face as a matter of law; the district court impermissably accepted the defendant governments' general conclusory allegations of denial for the dismissal of the complaint.

In addition, the District Court by its irregular proceedings obstructed the clerks of the federal courthouse from entering the plaintiff-appellant's motions and papers in the court record ("docket sheet") a ministerial duty breached over plaintiff's continuous and continuing protests. Motions to make substantial corrections in the docket sheet were denied by "endorsement" dated

January 30, 1981 by the Chief Judge; similar motions in the Court of Appeals were denied about March 13, 1981. The Court of Appeals Orders of March 13, 1981 sanctions the impermissible proceedings of the Distrct Court in this action. The order of November 20, 1981 by the Court of Appeals sanctions every departure by the District Court from accepted and usual course of judicial proceedings as to call for exercise of the Supreme Court's power of supervision.

STATEMENT OF THE CASE

The defendants include the Consul General of Sweden et al., both individually and officially; the President of the United States both individually and officially; the United States of America, federal agencies thereof, present and former heads of

agencies, officers and agents, officially and individually, thereof; numerous agencies of the City and State of New York, heads of agencies, officers and agents, officially and individually, thereof; several proprietary hospitals, officers and agents, thereof; banking institutions officers and agents thereof; a public utility's officers and agents, thereof.

The defendants as physicians and providers of health care services for the Veterans Administration are alleged to have caused deprivation of the petitioner's right to personal liberty, personal security and proper medical treatment by conducting a campaign of human experimentation. The defendants were joined, or replaced, over an extended period of time by other defendants who conducted a cover-up campaign in violation of several

constitutional and statutory provisions, including, except not limited to, administration of counter-indicated medication willfully, perversely, passionately, maliciously, with reckless disregard, putting the plaintiff's life in jeopardy in 1965 and again during the period 1968-1970, resulting in three hospitalizations, with one rehospitalization, leaving morbidities therefrom.

This petition seeks certiorarie of constitutional issues of transcendental importance which affect the operation of the largest hospital system in the United States--the Veterans Administration Centers--and the federal court system of the United States; the decisions of the inferior courts, and of this Court, will have a vital effect on hospital patients in V.A. medical centers throughout the nation as well as in the federal courts;

the substantial rights of the petitioners are at stake and it would be manifestly unjust to deny petitioner an opportunity to file a petition for writ of certiorari.

The plaintiff was unknowingly the subject of a research type program (pulmonary chest surgery) in 1950 which recently was discovered to be research and intentionally disabling; it is alleged that the 1968-70 infamies were designed to cover up the research experiments commenced just after World War II in V.A. Hospitals. Recently these occurrences climaxed with the unconstitutional Nobel Prize of 1977 as an attempt to confuse the public with further cover-up.

The Nobel Prize of 1977 in medicine and physiology to Rosalyn Sussman Yalow of the Bronx Veterans Administration Hospital was based on the

"fruits" of fraudulent and criminal activities in the Veterans Administration and the said Nobel presentation in the class of "medicine and physiology" by Sweden in concert with the United States State Department and agents of the United States[2] is now and was when made in 1977 a false and fraudulent conspiracy and the named conspirators know it to be false.

These special and important questions arise on federal law and are of such character which should be settled by this Supreme Court but which have not been.

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[2]Point V of Appellant's Reply Brief before the Second Circuit partly reduced defendants in number. Further reductions under Court approval are required by Petitioner's logic. The final defendants do not affect the fundamental issues of interest to the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS OVERLOOKED OR MISAPPREHENDED QUESTIONS OF LAW, OR FACT, INCLUDING PLAIN ERROR OR LAW APPARENT ON THE FACE OF THE RECORD, EVEN IN A CIVIL CASE, THE SUBSTANTIVE EVIDENCE RULE AND THE CLEARLY ERRONEOUS RULE TO CAUSE A MISCARRIAGE OF JUSTICE.

Without explicitly so stating in its order, the Court of Appeals says in effect that the plaintiff-appellant's briefs contain no appellent argument. Concerning the brief the factual matters may not be a vehicle for argument except stigmatization of the plaintiff's case as "frivolous" or not made in good faith, as characterized by the district court's dismissal order of December 5, 1980, compelled the plaintiff-appellant to labor under an onerous burden, which attacked his credibility. As a result of said order plaintiff was made to misunderstand the issues for appeal.

Nevertheless as now understood

the Court of Appeals order of November 20, 1981 has substantially differed from the district court by removing the designation "frivolous" and makes no reference to good faith. The Nobel prize to a member of the Veterans Administration is acknowledged by the Court of Appeals as "among the grievances" which is an actual controversy between the parties.

Plaintiff asserts that at the oral argument in the Court of Appeals he did present issues of absence or fair trial in the District Court and impermissibly incomplete docketing of plaintiff's motions on the docket sheet by the District Court.

The Court may in the interest of justice notice plain error apparent on the record and would examine the record on matters not briefed or excepted to at oral argument. See e.g.

Montgomery v. Marva Theaters (1954) 218 F. 2d 221.

The court in its discretion may consider--points not argued and briefed in a civil case--plain error apparent on face of the record in order to avoid a miscarriage of justice or to resolve a question of public concern. General Finance Loan Co. v. General Loan (1947) 163 F2d 709, 72 L. Ed. 421.

The Court of Appeals in its discretion may consider plain error of law apparent on the face of record for purpose of avoiding manifest miscarriage of justice or where issue raised is one of public concern, even in civil case Harris v. Smith (1967) 372 F. 2d. 806.

Questions of whether there are genuine issues of fact on grounds of fraud are matters for the jury. Hartford Indem. Acc. Co. 228 F. 2d. 391 1955.

Under substantial evidence rule reviewing court shall hold unlawful and set aside lower court's action, findings and conclusions found to be unsupported by substantial evidence on the record considered as a whole.

Clearly erroneous rule is appropriate where decision was clearly against the weight of evidence.

The conventional method of testing legal sufficiency of a complaint is by filing exceptions thereto and not by seeking declaratory judgment United States v. 149 Gift Packages D.C.N.Y. (1945) 52 F. Supp. 993. Furthermore Local Rule 3(g) U.S.D.C., S.D.N.Y. provides that defendants:

> ". . . motion for summary judgement purusuant to Rule 56 of the Fed. R. Civ. P. shall annex to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no

> genuine issue to be tried. Failure to submit such statement constitutes grounds for denial of the motions."

None of the defendants met this standard and in fact no defendant controverted any of the alleged facts. A complaint filed under 28 U.S.C., Sec. 2201 and Fed. R. Civ. P. for declaratory judgment on constitutional issues requires that all allegations of the complaint be accepted as true.

Questions of whether defendants pay damages resulting from injurious conduct as well as court costs is matter for jury.

And a petition for declaratory judgment need not show an accomplished injury but all other essentials of justiciable controversy must exist Perlberg v. Northwestern Mutl Life Ins. Co. D.C. Pa (1945) 82 F. Supp. 76.

II.a. MINISTERIAL DUTY BREACHED BY DISTRICT COURT WAS SANCTIONED BY COURT OF APPEALS' (2nd Circuit) ORDERS (2) ENTERED ABOUT MARCH 13, 1981 DENYING PETITIONER'S MOTIONS REQUESTING CERTIFICATION OF CONSTITUTIONAL QUESTIONS AND CORRECTION OF THE RECORD OF THE DISTRICT COURT.

II.b. THE DISTRICT COURT (MAC MAHON, Ch. J.) HAS MINISTERIAL DUTY TO PERMIT ALL OF PLAINTIFF-APPELLANT'S PAPERS TO BE ENTERED IN THE DOCKET CHRONOLOGICALLY BY RULE 79., FED. R. CIV. P. AS PER TREATMENT GIVEN TO DEFENDANTS.

During pre-trial period plaintiff-appellant made numerous inquiries as to reason his motions and papers were treated differently from those of the defendants with respect to the record. Where there was a substantial likelihood the pro se plaintiff would be irreparably harmed and further prejudiced by failure to docket his papers and motions in district court, the issue is not one of judicial discretion but of ministerial duty, or else worse.

On January 12, 1981 plaintiff provided district court with notice that there was a substanital "difference of opinion as to whether the record truly discloses what occurred below (paragraph "5")". Plaintiff cited authority of Rule 10, Rule 11(c) Fed. R. App. P. and Rule 60 Fed. R. Civ. P. The district court denied relief by order entered on January 30, 1981. Where plaintiff-appellant was forced to proceed into an appeal on docketing of the record fabricated and fragmented by the district court clerks, he was further burdened. (See Appendix E12).

Basis presented in the record shows plaintiff-appellant took exception to judicial manner as a matter of right. Col. Nat. Life Ins. Co. v. Foulke (1937) 89 F. 2d. 261, m. 382.

Questions of statutory interpretation, especially when arising in the first instance in judicial

proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the statute in question NLRB v. Heart Pub 332 U.S. 111, 88 L. Ed. 1170, 64 S. Ct. 851.

The Court's review extends to determining whether district court in arriving at its determination departed from the applicable rules. Shields v. Utah Idaho D.R. Co. 305 U.S. 177, 832 L. Ed. 111, 59 S. Ct. 160.

The Appendix to Brief filed in the Court of Appeals by Plaintiff-Appellant contains several of the motions made in the district court which support this appellant argument as does the record on its full face.

And, by letter dated October 9, 1980, sixteen (16) notices of claims, standard form 95, were deposited with John S. Martin, Jr., U.S. Attorney,

S.D.N.Y., against abusive agencies including, except not limited to, the following: "#10" on the U.S. Attorney, S.D.N.Y.; "#12" on the U.S. Marshall S.D.N.Y., and "#13" on the Clerk of the Court, S.D.N.Y. which additionally was served on October 10, 1980 through the Pro Se Office, S.D.N.Y. Then, even further pushing the issue, on October 31, 1980 the plaintiff-appellant filed an affidavit relative to those sixteen claims request an ex parte order under Rule 70, Red. R. Civ. P. to compel delivery of the sixteen documents to the agencies named.

III. WHERE COURT'S MANNER WAS PROMPTED BY WRONG MOTIVES THERE IS NOT ONLY AN ABUSE OF DISCRETION BUT THERE HAS BEEN NO EXERCISE OF DISCRETION ON THE MERITS.

Motives may sometimes be questioned where conduct of chief judge of district court was arbitrary,

capricious, without support in law or evidence, and prompted by wrongful motives. Whitney v. Morrow, 112 U.S. 693, 28 L. Ed. 871, 5 S. Ct. 333.

Because of serious nature of charge that trial judge had denied appellant fundamental right to fair trial reviewing court referred to original record. Picket v. Travelers Indemnity Co. 1960, 283 F. 2d. 835.

A court may determine whether or not discretion exists or has been exercised United States v. George S. Bush & Co. 310 U.S. 371, 84 L. Ed. 1259, 60 S. Ct. 944.

In order to maintain the correct perception of a layman prosecuting a civil rights action pro se the plaintiff cited the model cases he used to help frame his complaint, namely, 77 CIV 999 (Leonard Boudin of Counsel) and 78 CIV 2244 (Susan V.

Tipograph of Counsel). As a matter of fact, for reasons of shortness of time and expediency of the moment, this plaintiff's complaint (80 CIV 2076) contains a paragraph (¶60 at p. 60) which was borrowed in its entirety from the amended complaint (¶48 at p. 8) of Judith Clark et al. (78 CIV 2244) which in turn also appears in their complaint (¶38 at p. 8). Judicial notice of these paragraphs is hereby requested.

About mid-1980, in order to reply pro forma to plaintiff's own defendants (80 CIV 2076), the memoranda and motions of said civil action could have provided a useful sense of the requirements in law especially those of their defendant, New York Telephone Company, but unfortunately while the file for 78 CIV 2244 was generally available prior to Feburary 1980, 77Civ 999 was not.

We remind the court that plaintiff-appellant's complaint refers to an abuse, on pages 55-6, of the plaintiff by the Justice Department about May 10, 1978 almost two years before he filed his complaint or made use of the two model complaints.

Furthermore, this petitioner is familiar with textbooks such as "Practice and Procedural Forms" and the like for practicing attorneys. Nevertheless, it should be realized that the model complaints like those mentioned are not the usual type of complaint but were much needed by this petitioner.

In addition, while 77 CIV 999 was regularly without some reply brief or other matter, the file on 78 CIV 2244 for plaintiff's Judith Clark et al. was removed to a

magistrate's courtroom on the first floor. Obstinately plaintiff accepted the use of the vacant courtroom until the coercion and spooking got to be enough.

Subsequently, October 20, 1981 several of the plaintiff's of 78 CIV 2244 who also were suing the Justice Department were caught in the notorious attempted Nyack Brink's truck robbery. A reading of the complaint of Judith Clark et al. (78 CIV 2244) discloses allegations to the effect that elements of the criminal justice system impermissibly disrupt and interfere with contemplated and actual civil actions against the civil service bureaucracy.

Your petitioner, in this independent action of any of the

cases mentioned, tolerates no alleged self-serving vendetta on behalf of the civil service bureaucracy which invade his First Amendment right to petition these Courts.

Now regarding the conduct of Lloyd F. MacMahon, chief judge, and members of the Justice Department during the plaintiff's pre trail period below all the inferences cannot be drawn at this time but the United States Courts may do so. However, both the memorandum and order of the District Court and the motion and memorandum of the Federal government cite authorities which are not even remotely related to the plaintiff's case. More particularly Karlinsky v. N.Y. Racing Ass'n, Inc. 310 F. Supp. 937, 939-40 (S.D.N.Y. 1970), which

concerned the later notorious Buddy Jacobson who charged "the establishment" with antitrust violations in buying and selling of race horses and may have attempted to use the Federal Courts to review horse prices. In petitioner's brief at page 51 before the Court of Appeals this remoteness is noted.

Any vital defect such as one with respect to jurisdiction or proceudre (see Morgan v. U.S. 298 468, 80 L. Ed. 1288, 56 S. Ct. 906), bad faith (see Re McGee, 105 Kan. 574, 185 P. 14; 8 ALR 831) arbitrary or capricious action (see Kalwajtys v. Fed. Trade Comm. CA7, 237 F. 2d 654, 65 ALR 2d 220, 352 U.S. 1025, 1 L. Ed. 2d 597, 77 S. Ct. 591), or an abuse of power (see Swift v. U.S. 316 U.S. 216, 86 L. Ed. 1391, 62 S. Ct. 948) is subject to supervisory review of the Supreme Court.

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function (Crowell v. Benson, 285 U.S. 22, 76 L. Ed. 598, 52 S. Ct. 285 and Kendall v. Beiling, 295 Ky 782, 175 S.W. 2d 489).

IV. COMPLAINT FILED UNDER SECTIONS 2201 et seq OF 28 U.S.C. IS NOT SIMPLY DISMISSED WHERE CONSTITUTIONAL QUESTION EXISTS AND PROVIDES JURISDICTION TO THE COURTS FOR DECLARATION OF RIGHTS, FURTHER RELIEF AND CREATION OF A REMEDY.

Where injunctive relief was demanded in the complaint, single judge proceeding with non-jury trial was without rational basis in law.

Where prospective relief was necessary to prevent future deprivation of plaintiff-appellant's rights, single

judge abused authority and usurpsed judicial power.

With respect to the court's order of December 5, 1980, the plaintiff took exceptions by motion of December 22, 1980 requesting amendment of said order under provisions of Sec. 1292(b), 28 USC and Rule 5(a) FRAP; plaintiff claims the court's order is interlocutory not made on the merits. Further supporting allegations were made in paragraphs "8," "9," and "10" plaintiff's motion as follows:

> 8. The memorandum of the Court with the dismissal order was not rendered within the time provided by C.P.L.R. (60) days for a determination upon the original motions for dismisssal as alleged.
> 9. Review of a refusal of district court judge to convene a three-judge district court to hear and rule on matters of injuctive relief may be had in the U.S. Court of Appeals through a certified appeal under 28 U.S.C., sec. 1292(b) AS herein requested.
> 10. The plaintiff's right to trial by jury for all issues so

> triable is preserved by Rule 38 Fed. R. Civ. P. and may not be deemed waived at this time by any stay but it demanded hereby.

Paragraph "12" of said motion mentions still another motion made on December 11, 1980 pursuant to Rule 59, Fed. R. Civ. P., requesting an amendment of the Court's dismissal order of December 5, 1980, rehearing on a new trial based on new evidence. On December 15, 1980, unaware that a judgment was issued the same day, plaintiff submitted new evidence and papers on "personal knowledge." Even on December 9, 1980 the plaintiff-appellant was submitting motions unaware that the District Court had issued the alleged interlocutory order entered on December 5, 1981.

Basis presented in the record shows plaintiff took exception to judicial manner Col. Nat. Life Ins. v. Foulke (1937) 89 F. 2d 261 m. 382.

Plaintiff took exception to manner in which case was heard in court below and issue is whether case should have been heard at law instead or before judges as suit in equity. Anderson v. Aetna Ins. Co. (1937) 89 F. 2d 345.

Motion to dismiss in an action for declaratory judgment requires that all allegations of the complaint be accepted as true and on that basis determine whether the complaint presented a cause of action under 28 U.S.C. Sec. 2201 et seq and the Rule of Fed. R. Civ. P. sec. 123 F. 2d 518 (1941); 79 Supp. 908; 28 F. Supp. 308.

An action for declaratory judgment and injunction against deprivation of civil rights is not subject to dismissal on ground that pleadings presented no justiciable

controversy where complaint plainly stated that plaintiffs were being deprived of their constitutional rights

Bush v. Orleans Parish School Bd.

(1956) 138 F. Supp. 337.

V. SINGLE JUDGE OF DISTRICT COURT USURPED 3 JUDGE COURT POWER AND BY DENIAL OF JURY TO HEAR ISSUES IN CONTROVERSY ABUSED POWER (Points I-IV).

VI. THE ABSENCE OF AN EVIDENTIARY HEARING, BECAUSE FACTUAL DISPUTE EXISTED, WAS A DENIAL OF PETITIONER'S RIGHT TO FULL AND FAIR HEARING UNDER THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES (Points I-V).

VIIa. UNDER THE EMOLUMENT CLAUSE CLAIM (ARTICLE 1, SECTION 9, THE U.S. CONSTITUTION) AND U.S. STATUTES (22 U.S.C., SECTIONS 804, 2621 and 2625 and 18 U.S.C. SECTION 209(a), EMOLUMENTS SUCH AS THE NOBEL PRIZE OF 1977 TO EMPLOYEES OF THE VETERANS ADMINISTRATION ARE CONSTITUTIONALLY PROHIBITED AND SUBJECT TO JURISDICTION OF THE SUPREME COURT IN THIS CASE.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any

present, Emolument, Office, or Title, of any kind whatever, from any king, Prince or foreign State. (Article I, Section 9)

Rosalyn Sussman Yalow accepted the Nobel Prize of 1977 in Medicine and Physiology for the development of a technology called "radio immunoassay". This technology, called "R.I.A." for short, was developed during a long course of human experimentation conducted surreptitiously by Yalow with Solomon A. Berson (deceased) at the Bronx Veterans Administration Hospital.

As alleged in paragraph 57 at page 58 of petitioners complaint their results--relating directly to this Nobel Prize--were reported in the Journal for Clinical Investigation in 1956. (J. Clin. Invest. 1956, 35, 170). Sub paragraph 57.6. at page 59 of petitioners complaint alleges that their human experimentation was clearly unrelated to

any lawful purpose. As your petitioner is a university trained physicist he offers his opinion that their reported work is without benefit of the scientific method, merit or ethics.

The Nobel Prize of 1977 in medicine and physiology to Rosalyn Sussman Yalow of the Veterans Administration by agents of Sweden in concert with the U.S. State Department and agents of the United States is now and when made in 1977 a false and fraudulent conspiracy and the named conspirators know it to be false.

VII.b. HUMAN EXPERIMENTATION CONDUCTED IN VETERANS ADMINISTRATION HOSPITALS IS IN VIOLATION OF DOMESTIC HUMAN RIGHTS AS GUARANTEED UNDER THE NINTH AMENDMENT OF THE U.S. CONSTITUTION.

VII.c. THE CONSUL GENERAL ET AL. OF SWEDEN ARE SUBJECT TO THE CONSTITUTIONAL PROHIBITIONS ON EMOLUMENTS SUCH AS THE NOBEL PRIZE.

This Petitioners personal stake in the outcome of this controversy was clearly asserted in subparagraph 58.(b) at page 59 of his complaint by alleging three (3) separate occasions during 1954-1955 (October, 1954, February 1955 and June 1955) when Rosalyn Sussman Yalow and Solomon A. Berson subjected this petitioner to intravenous radioactive iodine-131. Petitioners asserted personal interest in the outcome of this case or controversly clearly demonstrates his standing to raise the constitutional issues.

"The case or controversy requirement comes into play only when the Federal Government does something that affects a person's life, his liberty, or his property. The wrong may be grievous...The restraint on "liberty"

may be fleeting and passing and still violate a fundamental guarantee Flast v. Cohen 392 U.S. at 107.

The Veterans Administration operates the largest hospital system in these United States and carries out human experimentation surrepticiously under the law 38 U.S.C. sec. 5051 et. seq. It also operates the largest cemetary system under the law 38 U.S.C. Sec. 1000 et. seq. Petitioner alleges that such a grave conflict of interest is also unconstitutional under the Ninth Amendment and the common law.

The constitutional questions raised here and in the complaint are alleged to be of transcendental importance on fundamental issues of vital interest throughout this nation. It is for that reason that such issues should be resolved by the Supreme Court of the United States.

CONCLUSION

WHEREFORE, it is respectfully requested that the herein petition for writ of certiorari be granted on the grounds set forth herein. Oral argument requested with further relief as is just.

Respectfully submitted,

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Petitioner proceeding pro se

Dated:

19th day of June, 1982